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P R O C E E D I N G S

[11:20 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear
argument next in Number 03-1027, Donald Rumsfeld
versus Jose Padilla. Mr. Clement?

ORAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may
it please the Court:

Unlike the Hamdi case, which raised not
only the question of the President's and the
military's authority to detain, but also questions
the process and access to counsel. This case raises
only two relatively discrete questions, first,
whether the habeas petition in this case, challenging
Hamdi's present physical confinement in South
Carolina, was properly filed in Manhattan, rather
than against the immediate custodian in South
Carolina, and second, whether the President has the
authority to detain a citizen who travels abroad,
affiliates and associates with the enemy abroad,
receives training in enemy camps in wiring and
explosives and then returns to the United States at
the direction of the enemy to commit hostile and
warlike acts.

1 Now, there are many aspects of this case
2 that raise issues that are really extraordinary, but
3 the habeas petition that was filed in this case was a
4 standard, indeed ordinary, use of the writ to
5 challenge the prisoner's present physical confinement
6 and the habeas rules are settled that when the writ
7 is used to challenge the present physical
8 confinement, the proper custodian, the proper
9 respondent, is the immediate custodian and the suit
10 should be filed in the district where that custodian
11 is present.

12 In other words, in a case to your present
13 physical confinement, the case should be filed in the
14 district of confinement.

15 QUESTION: May I ask you on that point,
16 Mr. Clement, supposing this petition had been filed
17 while he was still in New York, and then he was
18 removed to South Carolina. Would the petition be
19 okay, then?

20 MR. CLEMENT: There would be jurisdiction
21 in that case, Justice Stevens, under the Endo
22 decision. Now, I think in that case, there would
23 still be a question, especially if there was the, the
24 habeas petition was filed and he was immediately
25 removed, there would still be the question of venue

1 at that point and there is a Seventh Circuit case
2 hat's not in the briefs but Ross against Menday that
3 you may want to look at that says that in a case like
4 that presumptively --

5 QUESTION: I'm not quite sure what your
6 answer is to my question.

7 MR. CLEMENT: Oh, my answer is
8 jurisdiction yes, under this Court's decision in
9 Endo.

10 QUESTION: All right.

11 MR. CLEMENT: But then there would still
12 be a subsidiary question that's not raised here about
13 venue.

14 QUESTION: Which the government would
15 presumably would be free to raise.

16 MR. CLEMENT: Exactly, and we would raise
17 in the case where there was in fact jurisdiction.

18 QUESTION: Yes.

19 MR. CLEMENT: But in this case our
20 position is there is no jurisdiction whatsoever, and
21 I think that --

22 QUESTION: Jurisdiction under the Habeas
23 Statutes has been a bit of a confusion because, for
24 instance, on behalf of aliens, I think we have
25 allowed jurisdiction to be obtained in the manner it

1 was here, have we not?

2 MR. CLEMENT: I don't think so, Justice
3 O'Connor. I don't know which case have you in mind,
4 but I'm aware of no case of this Court that takes the
5 unprecedented step that the court below took, which
6 is basically to allow a habeas petition to go forward
7 in a case where neither the prisoner nor the
8 custodian is in the jurisdiction where the habeas
9 petition is filed.

10 QUESTION: What do you do with ex parte
11 Endo?

12 MR. CLEMENT: Well, Mr. Chief Justice, as
13 I was suggesting to Justice Stevens, that case
14 involves a kind of unique situation where a habeas
15 petition is filed, challenging a certain kind of
16 confinement, and then after the petition is filed,
17 and after jurisdiction attaches, the prisoner is
18 moved. In that case, it was an individual moved from
19 California to --

20 QUESTION: They never, they never named
21 any custodian in that case, did they?

22 MR. CLEMENT: Well, I don't know for sure,
23 Mr. Chief Justice, but I would say a couple of
24 things. One is on the immediate custodian rule, I
25 think that is a rule that perhaps the government

1 could waive in a case, and so if you have a situation
2 - - -

3 In a way Hamdi is that case where when the
4 habeas petition in Hamdi was filed, he was being
5 detained in Norfolk, which was in the Eastern
6 District of Virginia. It did not matter in that case
7 whether the immediate custodian was Paulette, who is
8 the brig, the commander of the brig, or Rumsfeld
9 because in the government's view, they are both
10 territorially present in the Eastern District of
11 Virginia.

12 So the immediate custodian rule I think is
13 something that government can waive. I don't think
14 that the territorial jurisdiction limit on the
15 courts, though, is something that the government is
16 in a position to waive. I think that is a
17 restriction on the power of the court to issue the
18 writ of habeas, and again, as I was indicating --

19 QUESTION: Well, is there a circuit split
20 on whether aliens can name the attorney general?

21 MR. CLEMENT: Yes, Justice O'Connor.
22 There is a circuit split on that issue, and I think
23 in some ways that issue is sort of tied up with this
24 case, though even there as I understand most of those
25 cases, there is a case from the Ninth Circuit called

1 Armantero, which in the government's view goes the
2 wrong way. There is favorable precedent in the Sixth
3 Circuit, the First Circuit, and the Seventh Circuit,
4 but even the Ninth Circuit, I think, envisions a case
5 where they view the attorney general as the proper
6 custodian, but they, you know, it's not clear where
7 they think that individual can be served.

8 Now, I suppose that the Ninth Circuit
9 applying that rule might also take the unprecedented
10 step here. It's also true if you want a sort of
11 sense of the potential for abuse in these cases, I
12 think could you point to the Ninth Circuit case where
13 the Ninth Circuit held that the Central District of
14 California had habeas jurisdiction over a claim filed
15 by a petitioner in Guantanamo. I mean, obviously
16 there is the issue that this Court has, but there is
17 a question of if there were jurisdiction, I wouldn't
18 have thought that it lay in the Central District of
19 California.

20 And I think that happens when you relax
21 these traditional rules. And I think particularly in
22 a case like --

23 QUESTION: Where does jurisdiction lie for
24 someone in Guantanamo, do you suppose?

25 MR. CLEMENT: Well, if, let me answer the

1 question this way, which is if you had a citizen in
2 Guantanamo.

3 QUESTION: Yes.

4 MR. CLEMENT: And under this Court's cases
5 like Toth against Quarles and Burns against Wilson,
6 that citizen is unable to file a habeas petition.
7 Our view is that the proper place to file that would
8 be either in the Eastern District of Virginia, if you
9 were naming the Secretary of Defense or if were you
10 naming some official present in the district, you
11 would sue in the District of Columbia.

12 But the important thing is even in that
13 case, the court where you filed the petition would
14 have jurisdiction, territorial jurisdiction over the
15 Respondent and what is so anomalous here is in a
16 sense, it doesn't, I mean it matters to us in the
17 sense that we think the proper Respondent is
18 Commander Marr, but even if you assume the proper
19 Respondent here is secretary Rumsfeld, the case still
20 shouldn't be brought in the Southern District of New
21 York. It should be brought in the Eastern District of
22 Virginia.

23 QUESTION: But why? Why, what difference
24 does it make to the government where they defend?

25 MR. CLEMENT: Well, I think there are a

1 number of --

2 QUESTION: I mean, there are offices all
3 over the country.

4 MR. CLEMENT: I think that's right, Justice
5 Stevens. I think it only makes sense to have the
6 defense mounted in the place where the detention is
7 taking place. And I think that's particularly true
8 in this case, because this isn't a petition that only
9 challenges the fact of confinement. If you look at
10 the, the petition in this case, the amended petition,
11 joint appendix page 56, the relief that's sought here
12 also goes to the conditions of confinement in
13 Commander Marr's brig. Now, in a case like that, it
14 seems --

15 QUESTION: Yes, but I'm not sure that's,
16 that's appropriate relief in a habeas petition,
17 anyway.

18 MR. CLEMENT: Well, I think you can file a
19 mixed petition and seek that kind of relief, but in
20 any event, I think that what they are looking for is
21 not just release from detention, but the stopping of
22 the interrogations.

23 QUESTION: -- how this particular case was
24 pleaded, which it wasn't, because we don't have any
25 flushing out of this, but you keep talking about

1 jurisdiction and it seems to me, this is essentially
2 a venue question. There is no question that Federal
3 courts have habeas jurisdiction. They have that
4 authority.

5 And you are talking about not the large
6 question, what kind of case can a Federal court hear,
7 you are talking about a where question, not a what
8 question. So it's essentially a venue question.

9 MR. CLEMENT: I mean, unless the word
10 essentially is going to bear a tremendous amount of
11 weight, I disagree because I think that what you have
12 here is not general venue principles. You have a
13 situation where the relevant statute that gives
14 courts habeas jurisdiction restricts their ability to
15 issue the writ to their territorial jurisdiction.
16 And this Court has been clear in cases like Carbo and
17 this is even consistent in Justice Rutledge's dissent
18 in the Ahrens case, that for that provision to have
19 any meaning at an irreducible minimum, it has to mean
20 that a writ that goes to the proper custodian has to
21 be filed within the territorial jurisdiction of the
22 District Court.

23 QUESTION: Although, if the prisoner is
24 moved, so prisoner goes someplace else, they still
25 have jurisdiction over the case, although the

1 original custodian no longer has the prisoner in his
2 or her care.

3 MR. CLEMENT: That's right, Justice
4 Ginsburg. And this Court decided that in Endo long
5 before Ahrens when it reaffirmed an even stricter
6 rule and there is nothing in the post-Ahrens cases
7 that suggests that this Court has ever deviated from
8 this understanding. And indeed I would point the
9 Court to the decision in Schlanger against Seamans,
10 because I think in some ways, it shows how, that that
11 case really decided this issue, because what the
12 court there had was an individual who was trying to
13 get ROTC scholarship in Arizona, but he was assigned
14 to a unit in Alabama, and he filed his habeas
15 petition in Arizona, and he named as Respondents an
16 individual in Arizona who had no custody over him
17 whatsoever, so that individual was out. He also
18 named the Secretary of the Air Force. The court did
19 not rely on that, and the court said that his true
20 custodian is his commanding officer in Georgia, and
21 what this Court said is there was no jurisdiction in
22 Arizona over that custodian in Georgia, and just to
23 be clear about it, the Court noted and rejected an
24 argument based on 28 U.S.C. 1391(e), which among
25 other things provides nationwide service of process

1 against Federal officials.

2 Now, if that statute had applied, then it
3 would have been perfectly appropriate to bring the
4 case in Arizona against a Georgia Respondent who was
5 a Federal officer. But the Court said no. 1391(e)
6 does not trump the habeas statute. Now, if that is
7 true of a Federal statute that provides for
8 nationwide service of process, it seems like it would
9 be true a fortiori for Federal Rule of Civil
10 Procedure 4. But that's the theory under which the
11 courts below exercised jurisdiction in this case.

12 QUESTION: Well, Mr. Clement, is Schlanger
13 still good law after Strait and Braden?

14 MR. CLEMENT: Absolutely, Your Honor. And
15 I think the best evidence of that, there is two
16 things I'd like to point to. But maybe the simplest
17 way is that both Strait and Braden cite Schlanger
18 favorably and, indeed, if you look at the very end of
19 the Braden opinion, when the court says that the
20 proper Respondent there is within the court's service
21 of process, it sites Schlanger for that proposition,
22 which makes sense because in that case the petition
23 was properly filed, challenging a Kentucky detainer
24 in Kentucky, so the proper Respondent was within the
25 territorial jurisdiction of the court in that case.

1 The second reason I would say that
2 Schlanger is very much good law as we pointed out in
3 our reply brief, is that the court in Schlanger went
4 out of its way, because at that point, Ahrens was
5 sort of already teetering on the verge of
6 obsolescence, to state that the rule would be exactly
7 the same even under Justice Rutledge's view in
8 Ahrens, so I think for those two reasons, Schlanger
9 continues to be good law, and clearly would trump any
10 service of process that would be provided by Rule 4.

11 And I think, and this is consistent with
12 what the unanimous three-judge court in the Fourth
13 Circuit said in the Hamdi case, that particularly in
14 cases that raise such sensitive issues as the cases
15 that are involved on the merits in this case, it is
16 particularly important that the court try to avoid
17 unnecessarily reaching Constitutional issues by first
18 ascertaining that it has jurisdiction. Now, if I --

19 QUESTION: You recognize that it isn't a
20 jurisdiction question like, can the Federal courts
21 entertain this kind of suit. Can they entertain a
22 fender bender between people from the same state?
23 No. Can they entertain Federal habeas cases. So we
24 have one Federal system, and there are classes of
25 cases that can go into that system and then we have

1 an allocation of where, so this isn't jurisdiction
2 writ large, it is where in this Federal system do you
3 bring this case?

4 MR. CLEMENT: Justice Ginsburg, its
5 statutory jurisdiction, but I agree. It is at some
6 level it is a which District Court question, not
7 whether District Courts are open to these claims at
8 all.

9 QUESTION: All right. If it's a which
10 District Court question, I mean, I don't know how
11 long you want to spend on the procedural issue, but I
12 take it if we follow your thing, never can you
13 entertain a habeas petition unless the body is in
14 this district, then immigration cases, military cases
15 are going to be a nightmare. If we follow a venue
16 principle, you are going to get just the right
17 result, which is we bring the case where it's most
18 convenient.

19 MR. CLEMENT: With respect, Justice
20 Breyer, I would disagree. I think that this Court,
21 it is true, in situations where it has relaxed the
22 notion of custody, and has allowed habeas petitions
23 to be brought in circumstances where they previously
24 weren't available, Strait against Laird is an
25 example. This Court's decision in Braden, basically

1 is an example because it was accommodating the
2 overruling of McNally against Hill and Payton against
3 Rowe. So in those contexts, where there is more than
4 one custody or some kind of metaphysical custody,
5 this Court has relaxed the rules in a way to
6 accommodate those, but it has never deviated. Never,
7 from the rule that you have to file the habeas
8 petition where the custodian is, and equally
9 important, it has never, there is no need to expand
10 the notion of custody, because you have a classic
11 habeas case where you are challenging your present
12 physical confinement. The courts never relax the
13 rules.

14 QUESTION: Let me ask you a question to
15 get you to the merits, if I can.

16 MR. CLEMENT: That would be fine.

17 QUESTION: Suppose, suppose that you're
18 right about your basic claim that the uniform, what
19 is it called, the Use of Force Act is in fact a
20 statute of the kind contemplated in 4001. Still, the
21 words in that act are, they can use necessary and
22 appropriate force. So why would it be necessary and
23 appropriate in a country that has its courts open,
24 that has regular criminal proceedings, that has all
25 the possibility of adjudicating a claim that I'm the

1 wrong person? Why is it a necessary and appropriate
2 thing to do once you have such a person who is a
3 citizen in this country to proceed by other than a
4 normal court procedure?

5 MR. CLEMENT: Justice Breyer, I will
6 answer the question. I would preface it by saying
7 that I certainly wouldn't read the authorization of
8 force's use of the term necessary and appropriate as
9 an invitation for sort of judicial management of the
10 executive's war-making power. I would have viewed it
11 as a delegation to the executive to use its
12 traditional authority to make discretionary judgments
13 in finding what is the necessary appropriate force.
14 And the Prize cases, I think, stand for that
15 proposition.

16 Now, if I can address the specifics,
17 though, why it might be necessary and appropriate
18 and, indeed, why is this Government asserting this
19 authority? It is precisely because, in this war on
20 terrorism, the Government can confront an individual
21 who is not only guilty of past war crimes, but
22 also --

23 QUESTION: Can I ask you just one last
24 question on the jurisdictional issue? If you assume
25 it's a question of venue rather than jurisdiction --

1 I know you're arguing in the alternative, but if you
2 assume it was venue rather than jurisdiction, would
3 New York not have been the proper venue since he was
4 held there as a material witness and he had a lawyer
5 appointed in that case?

6 MR. CLEMENT: Even if, contrary to our
7 position, it was a venue question, we would still say
8 no. And I think that you have to understand -- I
9 mean, the fact that he was in New York in the first
10 place is a bit of a happenstance. He tries to fly to
11 Chicago. He is seized in Chicago --

12 QUESTION: No, but the Government is
13 responsible for him being in New York, which it seems
14 to me, that they should not be complaining about
15 litigating there.

16 MR. CLEMENT: Well, with respect, Justice
17 Stevens, I don't think anybody would think that if
18 you filed a habeas petition to challenge Padilla's
19 detention as a material witness while he was being
20 detained in New York, that that should be filed in
21 Chicago.

22 And I think by the same logic, it doesn't
23 make any sense from what the gravamen of the -- the
24 gravamen of the challenge is to the conditions and
25 legality of the detention in South Carolina, why that

1 ought to be filed in New York just because he was
2 there under a different authority.

3 QUESTION: He had a lawyer appointed,
4 didn't he, there?

5 MR. CLEMENT: He did have a lawyer
6 appointed there. But again, I don't think -- I mean,
7 I think Mr. Dunham or his equivalent in South
8 Carolina would be available to provide whatever role
9 is necessary and appropriate under the circumstances.
10 I don't think there are only lawyers in New York.

11 QUESTION: I suppose it's a little easier
12 for the Government to find a lawyer wherever it needs
13 it than it would be for a prisoner being moved from
14 district to district.

15 MR. CLEMENT: In none of these cases have
16 we seen a problem with the detainees finding legal
17 representation.

18 QUESTION: Getting back to the merits,
19 merits part --

20 QUESTION: Could I hear his answer to the
21 previous question? You were in the middle of an
22 answer and I was waiting for the end of it.

23 MR. CLEMENT: Well, I hate to disappoint
24 you. I'm not sure that I had anything in particular
25 left other than to say that we would still -- I mean,

1 I think all I would say, and maybe I can reference
2 that there are Court of Appeals cases, the Seventh
3 Circuit has decided this Ross against Menday case
4 that basically say that even if you're in a venue
5 situation, even if you're within the rule of Ex parte
6 Endo, there is still a strong, strong presumption
7 that a habeas petition belongs in the district court
8 where the individual is being detained.

9 Now, maybe if you had a situation where
10 the habeas petition was up and running and close to a
11 final judgment or whatever. And then the individual
12 is detained, it makes sense to keep the proceeding in
13 the first venue. But in a case like -- if you had a
14 case where the day after the first petition is filed,
15 he's moved for independent and good reasons, I think
16 you would also say that the case belongs in the place
17 of detention.

18 QUESTION: What rights does Padilla have,
19 if any, in your view, that a belligerent who is
20 apprehended on the battlefield does not have? Is
21 Padilla just the same as somebody you catch in
22 Afghanistan?

23 MR. CLEMENT: I think for purposes of the
24 question before this Court, the authority question,
25 he is just the same. It may be that in an

1 appropriate juncture when the Court has before it the
2 question of what procedure should be applied, that
3 you would want to apply different procedures in a
4 case like this.

5 QUESTION: Can we punish him?

6 MR. CLEMENT: Could we punish him?
7 Certainly we could punish him if we decided to change
8 the nature of our processing of him. As this Court
9 made clear in Quirin --

10 QUESTION: Would you shoot him when he got
11 off the plane?

12 MR. CLEMENT: No, I don't think we could
13 for good and sufficient reasons --

14 QUESTION: I assume that you could shoot
15 someone that you had captured on the field of battle.

16 MR. CLEMENT: Not after we captured them
17 and brought them to safety. And I think in every
18 case, there are rules of engagement, there are rules
19 for the appropriate force that should be used. And I
20 don't know that there are any --

21 QUESTION: If they're an unlawful
22 belligerent?

23 MR. CLEMENT: Yes, even if they're an
24 unlawful belligerent. Once they're -- I mean, we
25 couldn't take somebody like Hamdi, for example, now

1 that he's been removed from the battlefield and is
2 completely -- poses no threat unless he's released
3 and use that kind of force on him.

4 QUESTION: But if the law is what the
5 executive says it is, whatever is necessary and
6 appropriate in the executive's judgment, as the
7 resolution you gave us that Congress passed, and it
8 leads you up to the executive, unchecked by the
9 judiciary. So what is it that would be a check
10 against torture?

11 MR. CLEMENT: Well, first of all, there
12 are treaty obligations. But the primary check is
13 that just as in every other war, if a U.S. military
14 person commits a war crime by creating some atrocity
15 on a harmless, you know, detained enemy combatant or
16 a prisoner of war, that violates our own conception
17 of what's a war crime. And we'll put that U.S.
18 military officer on trial in a court marshal. So I
19 think there are plenty of internal reasons --

20 QUESTION: Suppose the executive says mild
21 torture we think will help get this information.
22 It's not a soldier who does something against the
23 Code of Military Justice, but it's an executive
24 command. Some systems do that to get information.

25 MR. CLEMENT: Well, our executive doesn't

1 and I think -- I mean --

2 QUESTION: What's constraining? That's
3 the point. Is it just up to the good will of the
4 executive? Is there any judicial check?

5 MR. CLEMENT: This is a situation where
6 there is jurisdiction in the habeas courts. So if
7 necessary, they remain open. But I think it's very
8 important -- I mean, the court in *Ludecke* against
9 Watkins made clear that the fact that executive
10 discretion in a war situation can be abused is not a
11 good and sufficient reason for judicial
12 micromanagement and overseeing of that authority.

13 You have to recognize that in situations
14 where there is a war -- where the Government is on a
15 war footing, that you have to trust the executive to
16 make the kind of quintessential military judgments
17 that are involved in things like that.

18 QUESTION: So what is it that military --
19 go back to Justice Kennedy's question. I'm trying to
20 push you down the road a bit. And maybe we don't
21 have to decide this now. But I want to understand
22 your vision of it. I mean, a person has come to the
23 United States. He has, according to the Government,
24 committed a serious crime and is dangerous.

25 Well, those are people we deal with all

1 the time in the criminal process. So if you're even
2 assuming this resolution authorizes some kind of
3 force, why isn't the appropriate force, where he's in
4 the United States and the courts are open, what we
5 would call ordinary criminal process? I mean, that
6 harmonizes everything.

7 Now, maybe there is an answer to that in
8 your vision. I want to find out your vision of
9 what's supposed to happen here and why.

10 MR. CLEMENT: Well, Justice Breyer, let me
11 give you a practical reason answer and the legal
12 reason. You may prefer the former. But I think that
13 the practical reason is if you capture somebody who
14 is not just somebody who is guilty of a war crime or
15 a violation of some provision of Title 18, but also
16 has a wealth of information that could be used to
17 prevent future terrorist attacks, then it seems to me
18 that the military ought to have the option of
19 proceeding with him in a way that allows him to get
20 actionable intelligence to prevent future terrorist
21 attacks, and should not be forced into a choice where
22 the only way they can proceed is to proceed
23 retrospectively to try to punish him for past acts.

24 In doing so, whether it's a military
25 commission or an Article III, requires you to give

1 him a counsel who likely is going to say that you
2 shouldn't talk to the Government about any of these
3 things.

4 QUESTION: Would you have that authority
5 in the absence of the authorizing resolution? Would
6 the President have that authority?

7 MR. CLEMENT: I think he might well,
8 Justice Souter, and you in fact suggested that
9 yourself, which is if there was actionable
10 information --

11 QUESTION: No, I suggested that he might
12 have on September 12th. I don't think my suggestion
13 went much further. But I'll grant you that's an
14 argument, but do you believe he would have that
15 authority today in the absence of the authorizing
16 resolution?

17 MR. CLEMENT: Well, I think he would
18 certainly today, which is to say September 12th or
19 April 28th.

20 QUESTION: Two and a half months later.
21 But I mean, based on the rationale that there is a
22 need to bar him from what would be the normal process
23 that Justice Breyer is describing because of the need
24 to interrogate effectively. Your answer, I take it,
25 is he would have that authority even without the

1 authorizing resolution?

2 MR. CLEMENT: That would be my answer. I
3 would say the President had that authority on
4 September 10th, but I guess I would --

5 QUESTION: How does he get that from just
6 being commander-in-chief? I mean, I understand the
7 commander-in-chief power to be a power over the
8 military forces, when they're being used as military
9 forces, the General Washington power, you know, to
10 command the forces tactically and everything else.

11 It doesn't mean that he has power to do
12 whatever it takes to win the war. I mean, the Steel
13 Seizure case demonstrates that well enough. How does
14 this come within George Washington's
15 commander-in-chief power, which is what I read this
16 congressional resolution to be directed at? It
17 doesn't say you can do whatever it takes to win the
18 war.

19 MR. CLEMENT: No, but Justice Scalia,
20 presumably the authorization of force is read against
21 prior history and this Court's precedents. And those
22 precedents include the Quirin case where it is
23 absolutely clear that in fighting a war, you have the
24 authority to detain individuals, even if they're not
25 formal military officers who are affiliated with the

1 enemy and come into the United States intent on
2 committing hostile and warlike acts.

3 QUESTION: But Quirin rested on the fact
4 that there was congressional authorization for a
5 military commission to try on such charges.

6 MR. CLEMENT: Well, two things, Justice
7 Souter. First of all, I mean, you asked me a
8 hypothetical but we do have the authorization of
9 force here. Second of all, I don't think Quirin can
10 stand for the kind of clear statement rule that
11 others want to attribute to it for two reasons.

12 One, to the extent it applied any clear
13 statement rule, it runs in the opposite direction.
14 The Court said they would not strike down the
15 detention and try the individuals there absent a
16 clear conviction that it violated an act of Congress.

17 QUESTION: I guess I would settle, as a
18 rhetorical point, for the fact that it's not a clear
19 statement for you either.

20 MR. CLEMENT: Well, it actually -- it
21 purported to be. It said absent a clear conviction,
22 it wouldn't strike down the authority. But what I
23 would -- just to be clear, I think as we point out in
24 our reply brief, if you applied a clear statement
25 rule to Quirin, it would have to come out the other

1 way because Article II of the articles of war that
2 were in force at the time were restricted to members
3 of the United States military.

4 Article 15, which the Court relied on,
5 didn't expressly authorize military commissions
6 expressly. It did so by negative implication. So
7 it's simply not the case that you need an express
8 statutory authorization. If I could reserve my time
9 for rebuttal.

10 QUESTION: Very well, Mr. Clement.
11 Ms. Martinez, we'll hear from you.

12 ORAL ARGUMENT OF JENNIFER MARTINEZ

13 ON BEHALF OF THE RESPONDENTS

14 MS. MARTINEZ: Mr. Chief Justice, and may
15 it please the Court:

16 Even in wartime, America has always been a
17 nation governed by the rule of law. Today the
18 Government asks this Court for a broad ruling that
19 would allow the President unlimited power to imprison
20 any American anywhere at any time without trial
21 simply by labeling him an enemy combatant.

22 We ask this Court for a narrow ruling that
23 leaves for another day the grave constitutional
24 question of whether our system would permit the
25 indefinite imprisonment without trial of American

1 citizens on American soil based on suspicion that
2 they have associated with terrorists.

3 We simply ask this Court to hold that at a
4 minimum Congress would have to clearly and
5 unequivocally authorize such a departure from our
6 nation's traditions. And since Congress has not done
7 so, Mr. Padilla is entitled to be charged with a
8 crime and to have his day in court.

9 The detention at issue in this case is
10 exactly the type of detention that our Founding
11 Fathers were concerned about based on their
12 experience with the British Crown, where the king had
13 locked up citizens based on --

14 QUESTION: Ms. Martinez, the authorization
15 passed by Congress is quite broad and it talks about
16 force against individuals.

17 MS. MARTINEZ: Yes, Your Honor, but there
18 is no reference in the text of that authorization to
19 any power to detain American citizens on American
20 soil based on suspicion. And there is no indication
21 whatsoever in the debates that Congress contemplated
22 that it might be used in such a way.

23 QUESTION: Well, you surely don't think
24 that it excluded American citizens. I mean,
25 certainly it gave the President authority to wage war

1 against American citizens if they're on the other
2 side, didn't it?

3 MS. MARTINEZ: Certainly, Your Honor,
4 as --

5 QUESTION: So whatever authority it gave
6 him, there is no indication that it's limited to
7 non-citizens.

8 MS. MARTINEZ: No, but what is limited to
9 citizens is Section 4001 in which Congress
10 specifically provided that no citizen shall be
11 imprisoned or otherwise detained by the United States
12 except pursuant to an act of Congress.

13 QUESTION: And you would say that 4001
14 prevents the President from detaining on the
15 battlefield?

16 MS. MARTINEZ: No, Your Honor.

17 QUESTION: Well, then it doesn't mean what
18 you just said it meant.

19 MS. MARTINEZ: What we are talking
20 about -- first of all, there is a general presumption
21 against extraterritorial application of statutes.
22 And so in the absence of an indication that Congress
23 intended 4001 to apply overseas, that general
24 presumption would limit it to this country.
25 Moreover, the history of 4001 --

1 QUESTION: So the clear statement rule
2 doesn't apply to 4001?

3 MS. MARTINEZ: Which clear statement rule,
4 Your Honor?

5 QUESTION: Well, I thought you were
6 arguing for the clear statement rule.

7 MS. MARTINEZ: Yes, Your Honor, we are and
8 our argument is limited to detentions within this
9 country --

10 QUESTION: But your qualification is only
11 implied from the statute.

12 MS. MARTINEZ: Our argument is that what
13 there needs to be a clear statement of is of the
14 authority to detain an American citizen`on American
15 soil. And the reason for that is given, one, by the
16 history of section 4001 in which Congress looked at
17 the Emergency Detention Act that had been passed
18 during the Cold War which would have allowed the
19 President, in case of an internal security emergency
20 or war, to imprison individuals based on suspicion
21 that they were associated with a foreign power and
22 were going to engage in acts of terrorism.

23 QUESTION: What about hijackers? The
24 resolution has to do with 9/11. And the people were
25 hijackers and a lot of the hijackers are up in the

1 airplane and then they land. Do you think that the
2 resolution wasn't aimed at them in part?

3 MS. MARTINEZ: Your Honor, our position is
4 that certainly the President would have inherent
5 authority with or without this resolution to seize an
6 individual who is engaged in an act like that that
7 took place on 9/11. But after that individual had
8 been seized, in order to for that person to be held
9 in detention in this country, if they are a citizen,
10 in particular, there must be some express statutory
11 authorization that provides a framework for that
12 ongoing detention. And that comes not only from
13 4001, but also from the Due Process Clause, and --

14 QUESTION: And if they are captured on the
15 battlefield and then brought here, 4001 clicks into
16 operation, in your view?

17 MS. MARTINEZ: Our position is that 4001
18 applies within the United States and its text means
19 what it says, that no, no person --

20 QUESTION: Well, then your answer to my
21 question is yes?

22 MS. MARTINEZ: Yes, Your Honor.

23 QUESTION: So if you were --

24 QUESTION: So if we found American
25 citizens in Iraq who were firing on our forces and

1 brought them back here, they would have to be given
2 an Article III trial?

3 MS. MARTINEZ: Your Honor, our position is
4 that Congress could provide for some alternative
5 legislative scheme for dealing with such individuals.

6 QUESTION: What about my question on Iraq?

7 MS. MARTINEZ: At this time, our position
8 would be that such persons would have to be given an
9 Article III trial, unless Congress came in with some
10 other provision. Yes, Your Honor.

11 QUESTION: What distinguishes citizen? If
12 we are talking about someone like Padilla, who is in
13 the United States, the Due Process Clause refers to
14 person, not citizen. So I can see a distinction
15 between brought into the United States, but within
16 the United States, if it's someone who is, is an
17 alien, but is here with permission, a resident alien,
18 say --

19 MS. MARTINEZ: Yes, Your Honor. We would
20 agree that such persons are protected by the Due
21 Process Clause. 4001 refers only to citizens. But
22 we would agree that aliens within this country might
23 certainly be protected as well. This case simply
24 does not present that question, but we would not
25 disagree with that. I think what is important --

1 QUESTION: Well, let's get to that
2 question. Let's assume that we disagree with you
3 about 4001, and we think the authorization for use of
4 military force supersedes that. Then what, then what
5 is your position with respect to the rights of your
6 client?

7 MS. MARTINEZ: If Your Honors believe that
8 4000 -- that the authorization was meant to
9 specifically authorize the detention of American
10 citizens on American soil, we would contend first
11 that there is no limiting principle within that
12 authorization for who may be detained. The
13 Government claims that anyone who is associated with
14 Al Qaeda falls within this definition.

15 QUESTION: So the principle would be that
16 if somebody is like a missile sent over here, you
17 know, he is actually one of the hijackers or the
18 equivalent thereof, that's an obvious limiting
19 principle, that people who are sent offshore, sent
20 right over here and we catch them in mid-air.

21 MS. MARTINEZ: I think when you start
22 trying to draw those lines on a case-by-case basis
23 where this individual because they are actually in
24 the midst of a hijacking is close enough whereas some
25 other individual who is merely in the early stages of

1 a plot might not be enough, the difficulty of drawing
2 those lines shows the need for clear Congressional
3 action here.

4 This is primarily a job for Congress to
5 create, if there is a need in this country for
6 preventive detention of terrorists, that's a
7 legislative job for our legislature to undertake.

8 QUESTION: Declarations of war are just
9 not written this way. The Iraq declaration is not.
10 The recent declarations of war, formal declarations
11 are not, and AMUF is not.

12 MS. MARTINEZ: That's correct.

13 QUESTION: That's just not the tradition.
14 The President is given the authority.

15 MS. MARTINEZ: That's correct, Your Honor.
16 But broad authorizations for use of force in wartime
17 have also not traditionally be interpreted to allow
18 the executive unlimited power over citizens. So in
19 cases like Duncan and Endo, this Court has said that
20 a wartime authorization for action by the executive
21 should not be construed broadly, but should be
22 construed narrowly to give only the power that it
23 clearly and unequivocally indicates.

24 QUESTION: Well, Endo was concededly
25 loyal, and Duncan were civil crimes, a stockbroker

1 who was embezzling, right?

2 MS. MARTINEZ: That's correct, Your Honor.
3 But what 4001 was intended to prevent was a claim by
4 the executive that his broad inherent powers in
5 wartime, which was specifically what 4001 addressed,
6 would be enough to allow the detention of American
7 citizens.

8 QUESTION: Right. Can you give me a
9 minute or so on the, or as long as you want or short,
10 but suppose you get to the similar place by saying
11 that this resolution, suppose hypothetically, I'm not
12 saying what my view is, but hypothetically, suppose
13 you get to the same place by saying, yes, that
14 wartime resolution still doesn't authorize departing
15 from use of the criminal system, the ordinary
16 criminal system for somebody in the United States,
17 but for an unusually good reason.

18 Now, we have two possible reasons
19 advanced, one orally that we need to question him,
20 and one in the briefs, a suggestion that this man is
21 a ticking time bomb, and we can't reveal the evidence
22 without destroying intelligence. Now, I'd like your
23 vision of how this is supposed to play out under an
24 ordinary criminal system in response perhaps to what
25 those claims are.

1 MS. MARTINEZ: Our view would be that
2 because of the difficulty of the question of
3 determining, for example, as I believe Justice
4 Kennedy asked earlier, how long would such
5 interrogation be necessary? Would the district court
6 be required to take evidence on those sorts of
7 issues?

8 In the event that there were no other
9 alternatives, we believe that would be appropriate,
10 but we also believe that's quintessentially a
11 question for Congress, which could hold legislative
12 hearings. And after due deliberation, come to some
13 conclusion about what was required in this context.

14 And that is in fact what our democratic
15 allies, United Kingdom and Israel, have done in
16 passing specific legislation about the preventive
17 detention of suspected terrorists based on a
18 legislative finding about what periods of time --

19 QUESTION: Well, that would be, of course,
20 perhaps, desirable, but we are faced with a situation
21 of the here and now, and what do we do?

22 MS. MARTINEZ: Your Honor --

23 QUESTION: We just turn loose a ticking
24 time bomb?

25 MS. MARTINEZ: No, Your Honor. I believe

1 that, first of all, were this Court to rule that it
2 was -- that Congressional action was required, I have
3 no doubt that Congress would step into the breach
4 very quickly to provide whatever authorization the
5 executive branch deemed necessary. And so I think
6 there is no doubt that Congress would fill that
7 measure.

8 Here in this particular case, the
9 Government has already said that Mr. Padilla no
10 longer possesses any intelligence value, and so his
11 interrogation is at an end. And at this point, after
12 two years in detention, without any sort of hearing,
13 without any access to counsel, it's more than
14 appropriate that he be charged with a crime unless
15 Congress comes forward with some alternative scheme.

16 Now, if I may turn for a moment to the
17 issue of jurisdiction. Contrary to Mr. Clement's
18 suggestions, this case does primarily involve issues
19 of venue and not jurisdiction. This Court has never
20 held that there is a hard and fast rule requiring an
21 immediate custodian, and this Court has also not
22 applied rigid territorial requirements about the
23 location of a suit.

24 And in particular, in the Strait case,
25 this Court made clear that the type of jurisdiction

1 that was necessary was jurisdiction making the
2 Respondent amenable to service of process under the
3 long arm provisions by citing International Shoe and
4 McGee, which are provisions applying normal rules of
5 personal jurisdiction.

6 Given the particular circumstances of this
7 case, the extensive personal involvement of Secretary
8 Rumsfeld in this matter, makes him an appropriate
9 Respondent and New York is an appropriate venue for
10 this suit. The Government brought Mr. Padilla to New
11 York. They placed him in court proceedings there.
12 Counsel was appointed and litigation had begun. It
13 was the Government's choice to remove him from that
14 forum, but that does not change the fundamental fact
15 that jurisdiction was proper in New York.

16 QUESTION: Are you -- are you suggesting
17 then that this case might be an exception to some
18 more general rule because of the peculiar facts that
19 you have just recited?

20 MS. MARTINEZ: Yes, Your Honor. I think
21 that -- I think there is no hard and fast general
22 rule as the Government states it. There are numerous
23 exceptions already to the rule that the Government
24 articulates that can be found in prior cases.

25 QUESTION: Well, maybe there should be

1 some more definite rule. Supposing we were to say
2 that generally it's the Secretary of Defense and his
3 venue is in the Eastern District of Virginia.

4 MS. MARTINEZ: This Court might very well
5 decide to make such a venue rule, but I would note
6 that the Government at this point in the case has
7 waived their objection to venue by not pursuing it on
8 appeal. They challenged venue in the district court,
9 and they did not appeal that.

10 QUESTION: Well, but they have certainly
11 challenged the proper custodian here.

12 MS. MARTINEZ: Yes, Your Honor. They have
13 the challenged the proper custodian, but as this
14 court's decisions in cases like Endo, like
15 Eisentrager make clear, that the identity of the
16 proper Respondent is not a hard and fast or absolute
17 jurisdictional rule.

18 QUESTION: That doesn't change it from
19 jurisdiction to venue. I mean, venue is venue and
20 jurisdiction is jurisdiction. You may say that the
21 jurisdictional rule has been so haphazard that
22 effectively it amounts to the same thing. And that
23 argument will stand and fall on the basis of the
24 cases that you and Mr. Clement have discussed.

25 But to say that this is, this is venue is

1 simply wrong. I mean, it is a matter of the
2 jurisdiction of the Court, and it's always been
3 treated by that way in our opinions. We have not
4 discussed it as a venue rule.

5 QUESTION: Well, Your Honor, I do agree
6 that there is a jurisdictional question, and we
7 agreed that -- we argued that jurisdiction is proper.
8 But what Braden says is that the rule that Ahrens had
9 announced as a hard and fast jurisdictional rule
10 reflected nothing more than traditional venue
11 concerns.

12 And so Braden specifically says that
13 that -- that which was discussed in Ahrens went to
14 venue and not to jurisdiction. Returning --

15 QUESTION: Where you had conceivably
16 proper jurisdiction in several places.

17 MS. MARTINEZ: Yes, Your Honor. And we
18 would argue that jurisdiction was proper in New York
19 in this case because --

20 QUESTION: We are talking if we are using
21 the jurisdictional label, it's personal jurisdiction,
22 and not subject matter jurisdiction.

23 MS. MARTINEZ: That's correct, Your Honor,
24 and under this Court's decision in Strait, there was
25 personal jurisdiction over Secretary Rumsfeld in New

1 York because of his contacts with that forum.

2 Returning to the merits of this case, what
3 I think is important for this Court to realize is
4 that the war on terror presents many difficult
5 questions about the proper balance between civil
6 liberties and national security. Congress is the
7 body of our government that has been -- that was
8 entrusted by the Founders for making law to deal with
9 new situations. And Congress is fully capable of
10 considering the various parameters of any sort of
11 scheme of detention that might be necessary.

12 And certainly this Court would have the
13 power to review, to determine whether that system
14 established by Congress were constitutional, but what
15 we have here is a claim by the executive to a
16 virtually unlimited system, where any person that the
17 President deems an enemy combatant --

18 QUESTION: But on the basis of the, of the
19 Congressional authorization. He is not claiming it
20 just by virtue of executive power.

21 MS. MARTINEZ: Well, he claims them both
22 on the basis of inherent executive power and on the
23 basis of the authorization.

24 QUESTION: Well, but since they are, since
25 they are both the weakest -- weakest claim is

1 probably solely the executive. But I think you have
2 to deal with the claim that it's Congressional
3 authorization.

4 MS. MARTINEZ: Yes, Your Honor. There is
5 simply no indication that when Congress passed the
6 authorization for use of military force which enabled
7 us to deploy our troops overseas, the Congress also
8 thought that they were authorizing the indefinite
9 military detention without trial of American citizens
10 on American soil. There was no debate of such a
11 dramatic departure from our constitutional
12 traditions. And just a few weeks later when Congress
13 passed the Patriot Act, it extensively debated a
14 provision that allowed the detention of aliens for
15 seven days.

16 QUESTION: The trouble is, I don't see how
17 you can -- I mean, I think I can understand your
18 saying it doesn't give him any power except a
19 battlefield power. I can understand that. You might
20 read it that way. But I can't understand reading it
21 to say it applies to everybody, but not to United
22 States citizens. That line is just not there in the
23 resolution.

24 MS. MARTINEZ: We would say it does not
25 apply off the battlefield, certainly to U.S. citizens

1 on U.S. soil. And this Court --

2 QUESTION: But it does apply to aliens.

3 We -- the President could use force against aliens
4 under that resolution.

5 MS. MARTINEZ: This Court need not decide
6 that in this case, and I certainly don't --

7 QUESTION: I understand, but you are
8 proposing to us an interpretation of the resolution,
9 which I suggest makes no sense, unless you are
10 willing to say that it also doesn't apply to aliens
11 that are being brought -- that are committing these
12 acts within the country.

13 MS. MARTINEZ: I would agree that it does
14 not -- the authorization does not clearly indicate
15 that it's applicable to aliens either.

16 QUESTION: He might have the power to take
17 up the aliens and arrest them any way because 4001
18 doesn't prohibit it?

19 MS. MARTINEZ: Correct, Your Honor.

20 QUESTION: Is that your point?

21 MS. MARTINEZ: Correct, Your Honor. That
22 is our point, which is that the degree of specificity
23 that would need to be required to authorize this kind
24 of extraordinary detention of citizens would be
25 greater, and in particular with aliens, there has

1 always been a greater power of the executive because
2 they have no right to be here.

3 QUESTION: Then I take it then you have
4 no, assuming -- assuming that 4001 has been
5 superseded by the authorization. I assume you have
6 no principal basis for distinguishing between
7 citizens and aliens insofar as detaining an enemy
8 belligerent?

9 MS. MARTINEZ: No, Your Honor. As to
10 individuals within the United States, if 4001 is not
11 at issue because of its specific reference to
12 citizens, we would say aliens within the United
13 States would have the same, would be in exactly the
14 same position. Correct.

15 QUESTION: So you would make no
16 distinction between the two.

17 MS. MARTINEZ: Correct, Your Honor, were
18 it not for 4001. But we think 4001 calls for not
19 just for broad authorization of executive power, but
20 specific authorization, because 4001 was concerned
21 with the situation where there was a general
22 declaration of war, or where there was some type of
23 internal emergency.

24 And the concern was that the executive
25 should not be able to rely on that general

1 declaration of war or that general situation to lock
2 up citizens. That was precisely the situation with
3 the Japanese internment camps, the President --
4 President Roosevelt having authorized the broadest
5 possible force you can have to fight a war. There
6 was a declaration of complete war against Germany and
7 Japan.

8 Congress looked back on that and did not
9 want a future President to be able to find in such a
10 declaration of war the power to imprison American
11 citizens. They wanted it to come from specific
12 legislation.

13 QUESTION: So you say that has no
14 application on the battlefield because of the
15 principle of no extraterritorial effect of
16 United States statutes?

17 MS. MARTINEZ: Your Honor, certainly as to
18 an overseas battlefield, 4001, because of the
19 presumption against extraterritoriality, would not
20 apply.

21 QUESTION: Now, what if you capture an
22 American combatant and bring him back to the
23 United States, then 4001 --

24 MS. MARTINEZ: 4001 would apply upon his
25 return.

1 QUESTION: It would apply?

2 MS. MARTINEZ: Correct. And let me say
3 also, in respect to the Japanese internment camps,
4 Congress was very specific in passing 4001 that what
5 it wanted was democratic deliberation by our
6 lawmakers about the necessity of this kind of extreme
7 measure, where American citizens might be detained
8 without trial.

9 It didn't want that to slip under the
10 radar, under the umbrella of a general declaration of
11 war or general use of force. It wanted to ensure
12 that there was specific debate by Congress on those
13 very different constitutional questions presented in
14 those situations by the power of detaining citizens.

15 QUESTION: Did Congress at the time of
16 4001 consider other systems that do allow for
17 preventative detention, but then require the person
18 periodically to be brought before a judge to make
19 certain that the conditions still exist, like, as is
20 alleged in this case, to need to get evidence?

21 MS. MARTINEZ: Your Honor, there certainly
22 are many other systems that provide for that sort of
23 judicial review. In the United Kingdom and Israel,
24 for example, people detained under preventive
25 detention schemes are entitled to access to counsel,

1 they are entitled to prompt and periodic judicial
2 review under legislative standards to determine
3 whether those detentions can be continued.

4 And certainly there are many comparative
5 examples out there where legislatures have made those
6 kind of fact-findings about what's appropriate. And
7 there is no reason why our legislature could not
8 undertake such --

9 QUESTION: The reason -- and this is why
10 I've been harping on this thing of necessary and
11 appropriate. It seems to me if you take into account
12 the traditions of the United States ordinary criminal
13 processes, and you say, well, the forces act, the use
14 of force act, doesn't apply at all, then there is no
15 way to take care of the real emergency, the real
16 emergency, the real ticking time bomb, et cetera,
17 except to go back to Congress, which may or may not
18 act.

19 But if you get to the same result by
20 reading the necessary and appropriate thing to take
21 into account our traditions, you do leave the opening
22 there for the possibility of a real emergency which
23 would warrant an extraordinary proceeding. I'm just
24 exposing my thought on this so that I can get your
25 reaction.

1 MS. MARTINEZ: Yes, Your Honor. I think
2 that's absolutely correct. You could certainly read
3 the necessary and appropriate language that way. And
4 let me also make clear that we are not arguing that
5 the President would have no power either under the
6 AUMF or under his inherent powers to seize an
7 individual in the case of imminent violent activity.

8 We are simply talking about his power to
9 continue to detain that individual over many months
10 prior to that initial seizure. And so regardless of
11 how you read the AUMF, that's simply not what they're
12 arguing about. We're arguing about, once the
13 individual has been prevented from carrying out the
14 harmful attack, and once they're in Government
15 custody, can they simply be held forever without
16 trial until the end of the war on terror, or instead,
17 once they're taken into custody, must they be treated
18 in accordance with our positive laws.

19 QUESTION: So I take it you would say that
20 the resolution was inadequate to continue to hold
21 your client in the manner in which he is being held,
22 even on the day in which it was passed? This is not
23 a two and a half years later argument, it would be an
24 argument on the day it was passed?

25 MS. MARTINEZ: Yes, Your Honor,

1 particularly --

2 QUESTION: I just want to make sure I
3 understand you. But you would not necessarily have
4 objected, let's say, a week after September 11th,
5 even though there was no resolution?

6 MS. MARTINEZ: If there were a situation
7 where an individual, not like my client, but an
8 individual that were on the verge of engaging in
9 imminent violent conduct, certainly the President
10 would have the power, even under the Fourth
11 Amendment, to seize that individual without a warrant
12 and bring him into custody on the basis that they
13 were about to engage in a violent act.

14 But that's a far different situation from
15 seizing someone like my client who is not alleged to
16 be on the verge of imminent lawless activity, was not
17 in the process of hijacking an aircraft but was
18 simply alleged to be part of a plot --

19 QUESTION: Let me interrupt. When you say
20 it is clear he could do it if the defendant was about
21 to engage in that kind of conduct, by what standard
22 would you decide that he was about to? Probable
23 cause, proof beyond a reasonable doubt or just
24 suspicion?

25 MS. MARTINEZ: For the initial seizure, we

1 would say probable cause.

2 QUESTION: Reasonable suspicion based on
3 confidential intelligence would not be sufficient?

4 MS. MARTINEZ: We would submit no, but
5 it's possible that when that question came up, the
6 quantum of evidence might be weighed against the
7 danger that the executive perceived. If the
8 executive had some amount of suspicion that there was
9 about to be a very violent activity, it could be
10 possible that some lesser amount might be required
11 for the initial seizure. But we're not talking --

12 QUESTION: That's really a reasonable
13 suspicion standard, then, isn't it?

14 MS. MARTINEZ: Yes, Your Honor. But we're
15 not talking about that question of initial seizure
16 here. In this case we're talking about the ongoing
17 detention for two years of someone after there has
18 been --

19 QUESTION: You wouldn't just say two
20 years. You would certainly say that as soon as the
21 President prevented the act that he feared by taking
22 the person into custody, he immediately had no more
23 authority to detain him, wouldn't you? I mean --

24 MS. MARTINEZ: Yes.

25 QUESTION: That's the way the statute

1 you're relying on reads, that he shall not be
2 detained. So two years has nothing to do with it.

3 MS. MARTINEZ: Yes, Your Honor.

4 QUESTION: The next day he should, I
5 suppose, you know, hand him over to civil prosecution
6 authorities.

7 MS. MARTINEZ: Yes, Your Honor, we would
8 say at 48 hours under this Court's decisions. If
9 Congress thinks that a longer period of time is
10 appropriate in terrorism cases, it can do as other
11 countries have done and provide for a longer period
12 of time.

13 In the United Kingdom, there is a 48 hours
14 plus a maximum of 7 days without charge for suspected
15 terrorists. In the United Kingdom, up to 14 days.
16 Congress might come in and provide some legislative
17 extension. But in the absence of that, a normal rule
18 of 48 hours under County of Riverside would be
19 appropriate.

20 QUESTION: But we are not just talking
21 about terrorists here. We're talking about
22 terrorists associated with foreign forces.

23 MS. MARTINEZ: Yes, Your Honor. And let
24 me say that those are exactly the sort of individuals
25 that the passage of 4001 was designed to address.

1 The Emergency Detention Act, which 4001 repealed,
2 specifically talked about the possibility of
3 saboteurs in this country who are under the direction
4 and control of the communist empire.

5 And so there was a specific concern with
6 individuals who might be under that kind of power in
7 4001. And Congress wanted to make very clear that
8 such individuals could not simply be detained at
9 executive discretion, but could only be detained
10 pursuant to positive law. Positive law that is
11 simply nonexistent in this case.

12 The type of association with a terrorist
13 organization is also unclear based on the
14 Government's allegations in this case. Surely the
15 Government cannot claim that anyone who associated
16 with any member of Al Qaeda at any time would be
17 subject to indefinite military detention without
18 trial.

19 Mr. Padilla's mother, because she is
20 associated with her son, may be argued to have
21 associated with Al Qaeda, and clearly that's not what
22 Congress had in mind, to allow that person to be
23 locked up with no right to a lawyer, no right to a
24 hearing for as long as the war on terror lasts.
25 That's simply not consistent with our nation's

1 constitutional traditions, it's a limitless power and
2 there is no call for it in this case.

3 QUESTION: So you say that Judge Mukasey's
4 solution for this case was not adequate, then?

5 MS. MARTINEZ: Yes, Your Honor. We do not
6 believe that Judge Mukasey's solution was adequate.
7 We believe that in the first sentence, clear
8 authorization and parameters for such detention must
9 come from Congress, defining who ought to be detained
10 and what procedures ought to accompany those
11 detentions.

12 And at that point, this Court could review
13 them for consistency with the Constitution. But no,
14 while certainly Judge Mukasey's order was better than
15 what the Government offered, which was no process at
16 all, no opportunity to be heard and no access to
17 counsel, certainly Judge Mukasey's order was better
18 than that.

19 But when the indefinite deprivation of a
20 citizen's liberty is at stake, we would argue that
21 the Government must come forward with more than some
22 evidence consisting of any evidence in the record
23 that might support the Government's position that
24 he's associated with terrorists. When this type of
25 extreme deprivation of liberty is at issue, something

1 more than that is required by the Due Process Clause
2 and by our Constitution.

3 So certainly what we would say is that
4 this Court needs not to decide those issues today, of
5 what precise standard of proof ought to be given,
6 exactly when an individual ought to be allowed access
7 to counsel and what the limits are on how long such
8 an individual could be held, et cetera, because those
9 are primarily questions for Congress.

10 And this Court ought to wait until
11 Congress has come in and provided that kind of
12 guidance before it passes on these grave
13 constitutional questions, which really go to the core
14 of what our democracy is about, which is that the
15 Government cannot take citizens in this country off
16 the street and lock them up in jail forever without a
17 trial. That's never the way our country has operated
18 and it's fundamentally inconsistent with our
19 traditions. And so I would submit today is not the
20 day for this Court to decide whether that's
21 permissible.

22 The Government asks in this case for
23 basically limitless power and however grave the
24 circumstances of the war on terror may be, this
25 nation has faced other grave threats. We've had war

1 on our soil before and never before in our nation's
2 history has this Court granted the President a blank
3 check to do whatever he wants to American citizens.

4 So the fact that we're at war does not
5 mean that our normal constitutional rules do not
6 apply. Even in wartime, especially in wartime, the
7 Founders wanted to place limits on the ability of the
8 executive to deprive citizens of liberty. And they
9 were concerned, based on the history of the British
10 Crown, of the possibility that an unchecked executive
11 using excuses based on national security, using the
12 military power to render that superior to civilian
13 authorities, could exercise the exact type of power
14 that's at issue in this case. Thank you, Your Honor.

15 QUESTION: Thank you, Ms. Martinez. And
16 Mr. Clement, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

18 ON BEHALF OF RESPONDENTS

19 MR. CLEMENT: Thank you, Mr. Chief
20 Justice. I would like to make just three points.
21 First, on jurisdiction, it is true that the immediate
22 custodian rule is not a hard and fast rule and it has
23 been -- exceptions have been made. But the
24 territorial jurisdiction rule, as statutorily
25 prescribed, limits the Court's jurisdiction and is a

1 hard and fast rule.

2 And the best evidence of the relationship
3 between the two is in those cases where you had to
4 relax one or the other, when you had a citizen
5 detained abroad where the immediate custodian was
6 abroad outside the territorial jurisdiction of any
7 district court, rather than relax the rule of
8 territorial jurisdiction, the Court said you could
9 sue the Secretary of Defense in a district where
10 there is territorial jurisdiction over the
11 individual.

12 It is true there are situations like
13 Strait against Laird that don't involve normal
14 physical confinement, where the Court has had to come
15 up with some rule to deal with the fact that you only
16 have a metaphysical custodian. But in the case of a
17 physical detention of an individual, the Court has
18 never relaxed the rule that you file it in the
19 district where the immediate custodian is located.

20 And if you look at this Court's decision
21 in Carbo and Justice Rutledge's dissent in Ahrens,
22 you'll see that if you don't respect the rule in a
23 situation like this, there is nothing left to the
24 statutory language and nothing left of the intent of
25 the Congress that passed it.

1 The second point I would like to make is
2 that in looking at this case and the authority that's
3 asserted and the role of 4001(a), it's important to
4 recognize that there is a significant difference
5 between civilian authority and the military authority
6 over enemy combatants.

7 This Court, when it decided Endo and
8 addressed the situation of the detention of the
9 Japanese, specifically carved out the situation of
10 the military detention of enemy combatants and said
11 that that is not involved here. It stands to reason
12 that if Congress, in passing 4001(a) to effectively
13 prevent another Japanese internment camp of
14 concededly loyal citizens also probably wanted to put
15 to one side the issue of military detention of enemy
16 combatants.

17 In any event, the Court need not
18 ultimately decide whether 4001(a) has any application
19 because the authorization of force clearly provides
20 the necessary act of Congress. It authorizes not
21 Article III courts for these individuals. It
22 authorizes military force.

23 And the relevant line here is provided
24 this Court's case in Quirin, when somebody goes
25 abroad, associates with the enemy, takes weapons

1 training or explosives training with the enemy, and
2 then returns to the United States with the intent to
3 commit hostile and warlike acts at the direction of
4 the enemy, that classically falls within the Quirin
5 side of the line.

6 It's much different than a Landon Milligan
7 who never left the State of Indiana. And the
8 military has authority over that individual.

9 Lastly, let me just address the argument
10 that somehow you can constrain the authorization of
11 force and read it only to apply in a battlefield
12 setting. With respect, I think that ignores the
13 context in which it was passed. It was passed seven
14 days after September 11th. The resolution itself
15 recognizes that we face continuing threats at home
16 and abroad.

17 It was not passed as a matter of
18 retribution for those attacks, but to prevent future
19 attacks. To read it to deny the Government the
20 authority to detain a latter day citizen version of
21 Mohammed Atta is to simply ignore the will of
22 Congress. Thank you, Your Honor.

23 QUESTION: Thank you, Mr. Clement. The
24 case is submitted.

25 (Whereupon, at 12:20 p.m., the case in the

1 above-entitled matter was submitted.)
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